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Nos. 04-104 and 04-105

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

FREDDIE J. BOOKER,

Respondent.

—and—

UNITED STATES OF AMERICA,

Petitioner,

—v.—

DUCAN FANFAN,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* AN AD HOC GROUP OF FORMER FEDERAL JUDGES IN SUPPORT OF NEITHER PARTY

JOHN S. MARTIN, JR., *Pro se* and
Counsel of Record for the Amici
ALEXANDER K.A. GREENAWALT
KRISTIN D. KIEHN
MARTIN S. COHEN
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

All *amici curiae*, who are identified below, have served as either a United States District Court Judge or a Circuit Court of Appeals Judge. While some of them served prior to the effective date of the Sentencing Reform Act of 1984, many of them have substantial experience in imposing sentence under the Act. As a result of their service on the federal bench, each has a particularly strong interest in the quality of justice rendered in the federal courts, and in particular in the fairness of our sentencing system.

Not all *amici* necessarily prefer the federal Guidelines sentencing regime established by the Act to the pre-existing sentencing practice. Each of the *amici* agrees, however, on the need for some set of standards to guide the exercise of a district judge's sentencing discretion; each also believes that a higher quality of justice will result from a sentencing guideline regime that provides district judges with reasonably broad discretion to depart from a guideline sentence that is not within the heartland of cases to which the guidelines were intended to apply.

It is the position of *amici* that preserving a guidelines system that retains substantial judicial discretion and permits sentencing judges to make the factual findings that will determine how they exercise their traditional sentencing

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[1] Pursuant to Sup. Ct. R. 37, *amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and no entity other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk.

power will result in more just sentences than would result if this Court were to require a jury verdict on all sentencing factors that may increase a sentence. While conferring reasonable discretion on district judges may run the risk of increased disparity, denying them that discretion results in greater injustice to individual defendants.

Amici curiae include the following:

Jim R. Carrigan
United States District Court
District of Colorado, 1979-1995

Charles Clark
United States Court of Appeals
for the Fifth Circuit, 1969-1992

Kenneth Conboy
United States District Court
Southern District of New York, 1987-1993

John G. Davies
United States District Court
Central District of California, 1986-1998

Louis J. Freeh
United States District Court
Southern District of New York, 1991-1993

Barbara K. Hackett
United States District Court
Eastern District of Michigan, 1986-2000

Frederick B. Lacey
United States District Court
District of New Jersey, 1971-1986

Alfred J. Lechner, Jr.
United States District Court
District of New Jersey, 1986-2001

James K. Logan
United States Court of Appeals
for the Tenth Circuit, 1977-1998

Miles W. Lord
United States District Court
District of Minnesota, 1966-1985

John S. Martin, Jr.
United States District Court
Southern District of New York, 1990-2003

Stephen M. Orlofsky
United States District Court
District of New Jersey, 1996-2003

Lawrence W. Pierce
United States Court of Appeals
for the Second Circuit, 1981-1995
United States District Court,
Southern District of New York, 1971-1981

Charles Renfrew
United States District Court
Northern District of California, 1972-1980

Sidney O. Smith
United States District Court,
Northern District of Georgia, 1965-1974

Abraham D. Sofaer
United States District Court
Southern District of New York, 1979-1985

Herbert J. Stern
United States District Court
District of New Jersey, 1973-1987

Alfred M. Wolin
United States District Court
District of New Jersey, 1987-2004

Donald E. Ziegler
United States District Court
Western District of Pennsylvania, 1978-2003

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition for a writ of certiorari in these cases presents two questions: (1) whether the Sixth Amendment requires a jury trial with respect to factors, other than a prior conviction, that may enhance a sentence under the federal Sentencing Guidelines; and (2) if the answer to that question is yes, would that requirement invalidate the Guidelines as a whole or render them severable for constitutional purposes. In this *amicus* brief, we address only the first of these questions.

In the aftermath of this Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), federal courts have been mired in doubt over whether the federal Sentencing Guidelines violate a defendant's Sixth Amendment right to a jury trial as formulated by the *Blakely* majority. Yet, important distinctions exist between the federal Guidelines and the Washington sentencing scheme at issue in *Blakely*. Unlike the Washington system, the Guidelines do not establish statutory maximum sentences, nor do the Guidelines functionally alter the elements of federal crimes. Instead, the sentencing adjustments provided for by the federal Guidelines largely codify sentencing factors that judges have historically considered in imposing sentence.

An equally critical consideration is that the federal Guidelines preserve a judge's ability to depart from the Guideline sentencing range in appropriate cases. In imposing sentence, a district judge is limited only by the statutory range for a particular offense as set forth by Congress. As a result of this significant departure power, *amici* urge this Court to uphold the constitutionality of the Guidelines by recognizing that the federal Guidelines contain sufficient judicial

discretion so as not to trigger a defendant's right to a jury trial on any of the many factors that may conceivably increase an individual defendant's sentence.

The Guidelines do not merely approximate, through mandatory rules, the process and considerations judges have traditionally applied when exercising the discretion afforded by an indeterminate scheme to impose a sentence within a statutory range. The Guidelines also substantially *preserve* a court's sentencing discretion, delegating the ultimate sentencing authority to individual judges, who may depart from the range identified by the Guidelines where that range does not adequately address the individual circumstances of a particular case. This Court's opinion in *Koon v. United States*, 518 U.S. 81 (1996), articulates the breadth of the judicial discretion inherent in the Guidelines, underscoring the indeterminate nature of the federal scheme as one that does not compel a judge to impose a particular Guideline sentence. This substantial departure power takes into account "the vast range of human conduct potentially relevant to a sentencing decision." USSG § 1A1.1 comment. ¶ 4(b) (2003).

Because federal judges possess this substantial ability to depart from a Guideline range, the federal scheme does not implicate a defendant's right to have a jury decide facts that may increase a sentence pursuant to the holding announced in *Blakely*. Moreover, the ability to exercise broad judicial discretion is a crucial component of a just sentencing system — each individual defendant standing before a court presents a unique set of circumstances; those individuals are best served by a system in which judges apply their expertise to the determination of facts that should properly and justly influence sentences of imprisonment.

ARGUMENT

A Jury Trial Is Not Required With Respect to Sentencing Factors Because District Court Judges Have Substantial Discretion to Depart from the United States Sentencing Guidelines.

For much of the 200 years of our nation's history preceding the adoption of the Sentencing Reform Act of 1984, federal judges considered a variety of factors that either aggravated or mitigated the sentences imposed upon criminal defendants. For example, while not necessarily articulating the fact that "acceptance of responsibility" would reduce a sentence, judges regularly considered imposing lower sentences on those who pleaded guilty than on those who chose to go to trial, and any competent criminal defense attorney would warn a client that, if the client testified and the judge did not believe him, his sentence could be greater. Similarly, those who distributed large quantities of narcotics generally received longer sentences than those who sold small amounts; the length of the sentence of one convicted of fraud would generally be influenced by the amount of loss suffered by the victims; and with respect to all crimes, the leader of the criminal activity could expect to receive a greater sentence than a codefendant who was only minimally involved.

Because different judges gave varying weight to particular factors, and because the appellate courts refused to review sentences for abuse of discretion, the pre-guideline system resulted in substantial sentencing disparity. *See generally* Marvin E. Frankel, *Criminal Sentences: Law Without Order* (1973). In response to this inequity, and after considerable study, Congress enacted the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 *et seq.*, which established a Sentencing Commission charged with developing guidelines

for district judges to follow in imposing sentence. As Justice Blackman observed for the Court in *Mistretta v. United States*, 488 U.S. 361 (1989):

> Prior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them. The Sentencing Commission does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations.

Id. at 395.

The question now before the Court is whether, in light of *Blakely*, this change from a system of individualized discretion to one in which an individual judge's discretion is fettered by the collective discretion of the Sentencing Commission, *see Mistretta*, 488 U.S. at 396, has so changed the nature of the federal sentencing process that a jury trial is required with regard to any factor that may enhance a sentence under the Guidelines.

In *Blakely*, this Court ruled that Washington's statutory sentencing system, which provided for an increased sentence if a particular factor was present, violated the Sixth Amendment rule set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which dictates that "[o]ther than the fact of a

prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The *Blakely* Court ruled, in effect, that the Washington system was a determinate statutory sentencing scheme and therefore a jury must make the necessary factual determinations before a sentence can be enhanced beyond the maximum sentence required by the jury's verdict. At the same time, the Court recognized that in the traditional model of indeterminate sentencing within a fixed statutory range, under which courts consider a variety of factors when imposing sentence, a jury need not determine all factors that might increase an offender's sentence. *See Blakely*, 124 S. Ct. at 2540 ("Indeterminate sentencing . . . increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty."); *see also Williams v. New York*, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the source and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by the law.").

Thus, in evaluating the constitutional soundness of the Sentencing Guidelines under *Blakely*, this Court must consider whether the Sentencing Reform Act of 1984 established the type of determinate statutory sentencing scheme at issue in *Blakely*, or rather, whether the Guidelines represent a sentencing regime more analogous to the traditional indeterminate scheme in which judges have exercised substantial discretion in deciding what punishment to assign within a prescribed statutory range. *Amici* submit that the sentencing regime established by the Sentencing

Reform Act of 1984 is more analogous to the traditional indeterminate scheme because: (1) neither the Act nor the Guidelines change either the sentencing range or the elements of any federal crime; (2) the factors that enhance or reduce a Guideline calculation are factors that traditionally have been considered by judges in exercising their sentencing discretion; and (3) as this Court recognized in *Koon*, judges retain substantial discretion to depart from the Guideline-calculated sentencing range.

A. The Federal Guidelines Do Not Alter The Statutory Maximum Sentence Or The Elements Of Any Crime.

The Sentencing Reform Act of 1984 did not change the statutory sentencing range or the elements for any crime. *See United States v. Pineiro*, 377 F.3d 464, 473 (5th Cir. 2004); *United States v. Booker*, 375 F.3d 508, 519-20 (7th Cir. 2004) (Easterbrook, J., dissenting); *United States v. Emmenegger*, No. 04 CR.334, 2004 WL 1752599, at *15-*16 (S.D.N.Y. Aug. 4, 2004). Rather, the Act established a Sentencing Commission within the judicial branch to create guidelines to be used by district judges in imposing sentence and provided for appellate review where a sentence was outside the Guideline range. *See* 18 U.S.C. §§ 3553(a), 3742(a); 28 U.S.C. § 994(a). As this court observed when it upheld the constitutionality of the Guidelines in *Mistretta*, "[the Guidelines] do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations — impose sentences within the broad limits established by Congress." 488 U.S. at 396. This observation was recently reiterated by the Sixth Circuit Court of Appeals:

"[T]he Guidelines are agency-promulgated rules enacted by the Sentencing Commission — a non-elected body that finds its home within the Judicial Branch, the very branch of government . . . that all nine Justices of the Court agree has long exercised considerable discretion over sentencing determinations based on the same kinds of factual determinations that the Guidelines ask federal courts to make." *United States v. Koch*, No. 02-6278, 2004 WL 1899930, at *5 (6th Cir. Aug. 26, 2004).

By contrast, in *Blakely*, as was the case in *Apprendi*, the disputed sentencing scheme authorized judges to increase the *statutory* maximum punishment based on their own findings. As Judge Easterbrook observed in his dissent in *Booker*, "*Blakely* arose from a need to designate one of two statutes as the 'statutory maximum.' Washington called its statutes 'sentencing guidelines,' but names do not change facts." *Booker*, 375 F.3d at 518 (Easterbrook, J., dissenting). *Accord Pineiro*, 377 F.3d at 473; *Emmenegger*, 2004 WL 1752599, at *15-*16.

This distinction is more than formal: "[I]t makes sense in a substantive as well as a formal way to describe the 'standard sentencing range' in *Blakely* as the maximum punishment for that crime. The range is closely tailored to the specific elements of a narrowly-defined crime, and the aggravating factor cited by the judge overlaps almost entirely with the very factor that distinguishes those elements from those of first-degree kidnapping, an entirely distinct crime." *Emmenegger*, 2004 WL 1752599, at *16; *see also Booker*, 375 F.3d 508 at 519 (Easterbrook, J., dissenting) ("*Blakely* treated Washington [as] having established three degrees of kidnapping: the distinction between second- and third-degree kidnapping was deliberate cruelty. Having embedded this

distinction in its statute books, the Court held, Washington could not cut the jury out of the process.").

Thus, as several courts and dissenting judges have convincingly demonstrated, the federal Guidelines do not impose "statutory" maximums in the same manner as the Washington sentencing system.

B. The Guidelines Quantify Traditional Sentencing Factors.

When the Sentencing Commission carried out its mandate under the Sentencing Reform Act, the Commission purposefully did not dramatically change the nature of the factors that judges have traditionally considered in imposing sentences under indeterminate sentencing schemes. Rather, the Commission reviewed past sentencing practices and attempted to quantify the weight to be given to those factors or, in a limited number of instances, identified factors that should not be considered in imposing sentence. *See* USSG §1A1.1 comment. ¶ 4(b). Many of these factors involve open-ended subjective assessments that a jury would have little competence to decide. *See, e.g., United States v. Mueffelman*, CRIM. No. 01-CR-10387-NG, 2004 WL 1672320, at *10 (D. Mass. July 26, 2004) ("The specific provisions of the Guideline Manual were obviously drafted with judges, not juries in mind. In parts, the language is vague — for example, what is a 'vulnerable victim' or an 'otherwise extensive' organization. At times the Commission invented concepts that were entirely new to the criminal law.")

Taking as an example the federal wire fraud statute, which "cover[s] a vast range of behavior in undifferentiated, very general formulations," the *Emmenegger* court observed:

> Unlike many state guideline systems, the federal Guidelines do not set a 'standard sentencing range' for the crime of wire fraud, or for most other crimes of conviction. Rather, the Guidelines provide a methodology for assessing the seriousness of different instances of crime, quite separate from the elements of any particular statutory crime. Where it may make sense to think of the 49 – 53 month 'standard sentencing range' as the operative ordinary maximum punishment for kidnapping in the second degree in Washington, the federal Guidelines defy any effort to identify a 'standard sentencing range' (or a 'statutory maximum' other than the one literally provided by 18 U.S.C. § 1343) for wire fraud. The system simply does not work that way.

Emmenegger, 2004 WL 1752599, at *16; *see also Koch*, 2004 WL 1899930, at *6 (explaining that the Guidelines do not produce a "standard sentence" in the manner of Washington's two-factor sentencing grid).

The manner in which the Guidelines operate to assist judges in calculating sentences further distinguishes them from the regime in *Blakely* — the Guidelines incorporate a number of complex and subtle determinations that fall traditionally within the unique experience of judges as sentencing fact-finders.

C. The Guidelines Preserve Substantial Judicial Discretion.

Under this Court's holding in *Blakely*, whether a sentencing guidelines scheme requires a jury trial on

sentencing factors should depend upon the extent to which a sentencing judge retains the ultimate power to determine the appropriate sentence within the statutory range. This approach is, we believe, consistent with *Blakely*, in which the Court distinguished its earlier holding in *Williams v. New York*, 337 U.S. 241 (1949): "*Williams* involved an indeterminate sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death." *Blakely*, 124 S. Ct. at 2538. Because the federal Guidelines do not compel a sentencing judge to impose the Guidelines-determined sentence, the Guidelines more closely resemble the regime at issue in *Williams* than in *Blakely*.

In analyzing the nature of the federal Guidelines, it is helpful to consider several ways Congress and the courts could have responded to the pre-guideline sentencing disparity problem: (1) Congress or the courts could simply have provided that district judges would have to set forth on the record their reasons for imposing a particular sentence and all sentences would be reviewed on appeal; (2) once appellate review was established, the Judicial Conference of the United States, through its Criminal Law Committee, could have adopted non-binding guidelines to be used by district judges in imposing sentence and by the appellate courts in determining whether there had been an abuse of discretion; or (3) the Chief Justice could have appointed a special committee of outside experts to draw up a set of guidelines to be considered by the district and appellate courts in making sentencing decisions. Because each of these responses would have maintained the existing indeterminate sentencing scheme and simply provided judges with a more rational basis upon which to exercise their discretion, *Blakely* should not compel the conclusion that any of those sentencing schemes

would require a jury finding with respect to any fact that might cause a judge to increase a sentence.

On the other hand, had Congress responded to the sentencing disparity problem by adopting its own set of guidelines providing judges with no discretion to depart from a guideline-determined sentence, Congress would likely have established a determinate sentencing scheme that infringed on the Sixth Amendment right identified in *Blakely*.

We recognize that there is no bright line separating a determinate from an indeterminate sentencing scheme and suggest that the answer to the question of whether a judge or jury should decide a sentencing fact be determined by looking at the extent to which the sentencing judge is able to exercise substantial discretion in imposing sentence. If judges do, in fact, retain the ultimate sentencing authority and are not "compelled" to impose a Guidelines sentence, then there should be no requirement that a jury decide the factual matters that may influence a judge's exercise of discretion. *Amici* submit that under the Sentencing Guidelines — as conceived by Congress, formulated by the Sentencing Commission, and implemented by district judges — courts retain substantial sentencing discretion, and therefore, the Guidelines comply fully with the Sixth Amendment right to a jury trial.

The Sentencing Reform Act expressly recognized that sentencing judges would have the power to depart from a sentence prescribed by the Guidelines range where "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described," 18 U.S.C. § 3553(b), and also

provided that when imposing sentence, a court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant." *Id.* § 3553(a). That authority was expressly incorporated into the Guidelines. *See* USSG § 5K2.0.

That Congress did not intend to cabin judicial discretion is further confirmed by the Senate Judiciary Committee Report on the Sentencing Reform Act, which states:

> The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case. The purpose of the sentencing guidelines is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

S. Rep. No. 98-225, 2d Sess., at 52-53 (1984).

In *Koon*, this Court carefully considered both the statutory language and the legislative history of the Sentencing Reform Act and concluded in the eloquent language of Justice Kennedy:

> The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this

> respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This, too, must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the congressional purpose to withdraw all sentencing discretion from the United States district judge. Discretion is reserved within the Sentencing Guidelines . . . .

518 U.S. at 113.

The fact that the Sentencing Reform Act did not strip district judges of substantial departure power was confirmed by the Sentencing Commission, when it said, subsequent to the decision in *Koon*:

> Under section 5K2.0 (Grounds for Departure), the Commission granted broad departure authority to district courts by adopting the language of 18 U.S.C. § 3553(b), which provides that a court is permitted to depart from a guideline sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The discretionary power of district

> courts was broadened by the 1996 decision in *Koon v. United States*.

U.S. Sentencing Comm'n, *1999 Annual Report*, at 25.[2]

The Sixth Circuit recently emphasized the continuing significance of the departure power point post-*Blakely*:

> The Guidelines do not supply a clear "standard sentencing range" for each defendant and indeed represent a form of indeterminate-determinate sentencing because even after application of the hundreds of pages of

[2] The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified in scattered sections of 18, 28, and 42 U.S.C.), was signed into law by President Bush on April 30, 2003. Section 401 of the PROTECT Act, commonly known as the Feeney Amendment, and the corresponding amendments made by the Sentencing Commission to the November 2003 Guidelines, USSG §§ 5K2.0(b) and (c) (2003), reduced the discretion of district court judges by limiting the availability of combination-of-factors departures and, in cases involving sexual offenses against children, confining the available bases for departure to those factors identified explicitly in the Guidelines and its policy statements. We note that because the Feeney Amendment's limitation on departure power in cases involving sex offenses against children converts the Guidelines to a determinate sentencing scheme in that context, and because it constrains judicial discretion to depart in all cases, the amendment may constitute an unconstitutional restriction on district court discretion in light of *Blakely*. However, because application of the amendment is not at issue in either of the cases presently before the Court, this Court need not address the constitutionality of the Feeney Amendment.

> Guidelines Manual, to say nothing of relevant case law, to each individual defendant's sentence, judges *still may increase (or decrease) sentences* based on factors not addressed in the Guidelines. No "standard" sentence for categories of defendants thus emerges from the Guidelines in the same way that it does for the two-factor sentencing grid that Washington's legislature adopted.

Koch, 2004 WL 1899930, at *6 (emphasis added, internal citations omitted); *see also Booker*, 375 F.3d at 520 (Easterbrook, J., dissenting) ("Given the matrix-like nature of the system and the possibility of departure, the only finding that is *indispensable* to Booker's sentence is the one specified by the statute: did he distribute more than 50 grams of cocaine base? The jury found beyond a reasonable doubt that he had."). Thus, it cannot be said, within the terms of the *Blakely* decision, that a defendant convicted of a federal crime "has a legal *right* to a lesser sentence" that is violated by the imposition of judge-made findings under the Guidelines. *Blakely*, 124 S. Ct. at 2540.

This Court's opinion in *Koon* firmly establishes that district judges have substantial discretion to depart from a Guidelines sentence. We recognize that some circuit courts of appeal have clearly failed to recognize the breadth of the departure power that *Koon* acknowledged and, in those circuits, the Guidelines in effect operate as a determinate scheme. For example, in the Fourth Circuit, the rate of

departures by district judges under § 5K2.0 is only 6%.[3] *See* Add.-1–3 (U.S. Sentencing Comm'n, *Sourcebook of Federal Sentencing Statistics*, at Table 26 (Fiscal Year 2002)) [hereinafter "*2002 Sourcebook*"].[4] *Amici* submit, however, that the legislative history of the Sentencing Reform Act and this Court's opinion in *Koon* demonstrate that those circuits are in error and that district judges do have broad authority to depart from the Guidelines. While not all lower federal courts have recognized this broad departure power, statistics compiled by the Sentencing Commission demonstrate that many federal judges do recognize a substantial ability to depart from the Guidelines in appropriate cases.

In the last year for which statistics are available, 2002, only 65% of the 58,684 sentences imposed in the federal courts fell within the Guidelines range, and there were § 5K2.0 departures by judges in over 21% of the cases in which a Guidelines sentence was required (*i.e.*, cases other than those in which the government sought a substantial assistance departure). *Id.* These departures occurred in every major offense category. For example, there were § 5K2.0 departure rates of more than 10% in most major offense categories,

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[3] This departure percentage and those that follow are calculated by excluding sentenced cases in which the government sought a substantial assistance departure under § 5K1.0.

[4] Discretionary departures under the Washington sentencing scheme at issue in *Blakely* were even more rare. *See* State of Washington Sentencing Guidelines Comm'n, *Statistical Summary of Adult Felony Sentencing, Fiscal Year 2003*, at 21 (Jan. 2004) (demonstrating that only 4% of Washington State sentences in Fiscal Year 2003 were outside of the standard sentencing range), *available at* http://www.sgc.wa.gov.

including 3,986 such departures in narcotics trafficking cases. *See* Add.-4 (*2002 Sourcebook*, at Table 27). While high rates of § 5K2.0 departures such as those in several of the border districts, for example, 67% in Arizona and 60% in Southern California, resulted in part from "fast track" programs in immigration and narcotics cases, there were high rates of departure in other districts that did not have such programs. *See* Add.-1–3 (*2002 Sourcebook*, at Table 26). For example, judges in the District of Connecticut departed in 40% of the cases that required a Guidelines sentence, and in the Eastern District of New York, judges departed in 35% of such cases.

Sentencing judges have exercised their departure power to impose sentences at the very top of the statutory range, *see, e.g.*, *United States v. Merritt*, 988 F.2d 1298, 1305 (2d Cir. 1993) (upholding decision to apply statutory maximum 60-month sentence where Guidelines offense level would otherwise have resulted in sentence of 30 – 37 months), and at the very bottom, *see, e.g.*, *United States v. Osseiran*, 798 F. Supp. 861, 870 & n.9 (D. Mass. 1992) (sentence for drug-related offense reduced from minimum 151-month term indicated by the Guidelines to the minimum 10-year statutory sentence).

Judges have also employed a variety of reasons to justify both upward and downward departures. For example, courts have successfully authorized departures in cases where the drug quantity tables in the Guidelines did not address "the relationship between the amount of narcotics distributed by a defendant and the length of time it took the defendant to accomplish the distribution," *United States. v. Lara*, 47 F.3d 60, 63 (2d Cir. 1995) (internal quotation marks omitted); where the Guidelines did not adequately take account of the defendant's continuing fraudulent efforts to retain the profits of his crime, *see Merritt*, 988 F.2d at 1305; where defendants

convicted of fraud caused loss of confidence in an important institution (the stock market), *see United States v. Rennert*, 374 F.3d 206, 210 (3d Cir. 2004); and where the defendant knowingly subjected adolescents to HIV through several sexual acts, *see United States v. Blas*, 360 F.3d 1268, 1273-74 (11th Cir. 2004). As these examples illustrate, judicial discretion over sentencing remains both broad and meaningful in those circuits that have recognized the full extent of the Guidelines' departure power.

Were this Court of the view that the 6% rate of departure in the Fourth Circuit accurately reflects the extent of discretion district judges possess in imposing Guidelines sentences, it would be difficult to argue that a jury trial would not be required for sentencing-enhancing factors under *Blakely*'s formulation. If, on the other hand, the 24% departure rate in the Second Circuit accurately reflects the sentencing discretion that this Court recognized in *Koon*, then the sentencing system in the federal courts should be found to be closer to an indeterminate regime than it is to a determinate one, and a jury trial on sentencing factors should not be required under *Blakely*.

Even were this Court to conclude that in order for there to be no jury requirement, district court judges would have to possess even broader departure power than was recognized in *Koon*, the doctrine that statutes should be construed to avoid constitutional questions would favor construing 18 U.S.C. §3553(b) as incorporating as broad a departure power as is necessary to avoid a jury trial requirement. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (noting that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the

statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). This Court has recognized that this avoidance canon "rests upon our respect for Congress, which we assume legislates in the light of constitutional limitations." *Harris v. United States*, 536 U.S. 545, 556 (2002) (internal quotation marks omitted).

In sum, *amici* submit that the Sentencing Reform Act, which did not change either the elements or the sentencing range for any criminal statute, did precisely what Congress intended — the Act provided a mechanism for informing the discretion of sentencing judges and established standards to guide appellate courts in their review of those sentences. While the lower federal courts have been far from uniform in recognizing the extent of the discretion district judges retain under the Guidelines, those courts that have exercised substantial discretion in departing from the Guidelines have correctly construed the Act and this Court's opinion in *Koon*. Those judges who recognize that they are not compelled to impose a Guidelines sentence should not be compelled to empanel a jury to tell them what facts they may consider in exercising their sentencing discretion.

Those who favor sentencing guidelines observe that such guidelines provide a rational basis for ensuring that defendants who commit similar crimes in similar circumstances will receive similar sentences, and that the length of time that any defendant serves in prison will not depend upon the whim of an individual judge. Those who have opposed sentencing guidelines view them as a rigid mechanism that fails to take into account the infinite variety of facts and circumstances that may differentiate the culpability of individuals convicted of the same statutory offense. The sentencing scheme that *amici* urge this Court to

recognize is one that preserves a system of guidelines that enables district judges to impose similar sentences on similarly situated defendants, but reserves to the sentencing judge the substantial discretion that is necessary "to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon*, 518 U.S. at 113.

While the recognition that district judges have substantial discretion under the Guidelines creates a risk of greater disparity, ending such disparity — a worthy purpose — should not be the principal goal of a sentencing regime. Instead, the principal goal of any sentencing scheme should be to do justice to each individual who comes before the bar of justice. The only way that we can come close to reaching that goal is by giving district judges the reasonable sentencing discretion they require to make the punishment fit the crime.

CONCLUSION

Because each of the courts below held the Guidelines unconstitutional, at least in part, *amici* respectfully submit that the decisions below should be reversed and the cases remanded for resentencing in light of the Court's opinion in this case.

JOHN S. MARTIN, JR., *Pro se* and
Counsel of Record for the Amici
ALEXANDER K.A. GREENAWALT
KRISTIN D. KIEHN
MARTIN S. COHEN
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000

Counsel for Amici Curiae

September 1, 2004

ADDENDUM

Table 26

GUIDELINE DEPARTURE RATE BY CIRCUIT AND DISTRICT[1]
Fiscal Year 2002 (Prior to Enactment of the PROTECT Act)

CIRCUIT / District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		SUBSTANTIAL ASSISTANCE DEPARTURE		OTHER DOWNWARD DEPARTURE		UPWARD DEPARTURE	
		#	%	#	%	#	%	#	%
TOTAL	**58,684**	**38,159**	**65.0**	**10,203**	**17.4**	**9,865**	**16.8**	**457**	**0.8**
D.C. CIRCUIT	411	246	59.9	128	31.1	35	8.5	2	0.5
District of Columbia	411	246	59.9	128	31.1	35	8.5	2	0.5
FIRST CIRCUIT	1,813	1,373	75.7	261	14.4	169	9.3	10	0.6
Maine	188	134	71.3	44	23.4	9	4.8	1	0.5
Massachusetts	682	363	60.3	122	20.3	113	18.8	4	0.7
New Hampshire	130	80	61.5	35	26.9	15	11.5	0	0.0
Puerto Rico	758	680	89.7	53	7.0	23	3.0	2	0.3
Rhode Island	135	116	85.9	7	5.2	9	6.7	3	2.2
SECOND CIRCUIT	4,977	2,501	61.3	773	19.0	779	19.1	24	0.6
Connecticut	336	175	53.7	32	9.8	115	35.3	4	1.2
New York									
Eastern	1,383	744	53.8	242	17.5	393	28.4	4	0.3
Northern	359	205	57.1	106	29.5	43	12.0	5	1.4
Southern	1,484	1,046	70.5	223	15.0	130	9.3	5	0.4
Western	434	245	56.5	137	31.6	97	22.8	5	1.2
Vermont	171	86	50.3	33	19.3	51	29.8	1	0.6
THIRD CIRCUIT	2,654	1,564	58.9	888	33.3	209	7.9	25	0.9
Delaware	67	49	73.1	11	16.4	7	10.4	0	0.0
New Jersey	814	490	60.2	241	29.6	78	9.6	5	0.6
Pennsylvania									
Eastern	966	487	50.4	397	41.1	73	7.6	9	0.9
Middle	413	245	59.3	133	32.2	26	6.3	9	2.2
Western	320	237	74.1	63	19.7	20	6.3	0	0.0
Virgin Islands	74	56	75.7	13	17.6	5	6.8	2	2.6
FOURTH CIRCUIT	5,838	3,858	76.6	937	18.6	260	4.2	33	0.7
Maryland	510	286	56.1	161	31.6	57	11.2	6	1.2
North Carolina									
Eastern	569	398	69.9	139	24.4	23	4.0	9	1.6
Middle	423	353	83.8	45	10.6	11	2.6	4	0.9
Western	522	327	62.6	177	33.9	21	4.0	1	0.2
South Carolina	971	711	73.2	229	23.6	28	2.9	3	0.3
Virginia									
Eastern	1,191	1,071	89.9	75	6.3	43	3.6	2	0.2
Western	384	290	75.5	81	21.1	12	3.1	1	0.3
West Virginia									
Northern	260	227	87.3	18	6.9	10	3.8	5	1.9
Southern	208	185	88.9	16	7.7	5	2.4	2	1.0

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Table 26 (cont.)

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE n	 %	SUBSTANTIAL ASSISTANCE DEPARTURE n	 %	OTHER DOWNWARD DEPARTURE n	 %	UPWARD DEPARTURE n	 %
FIFTH CIRCUIT	**12,331**	**8,689**	**71.0**	**1,635**	**13.4**	**1,792**	**14.7**	**105**	**0.9**
Louisiana									
Eastern	481	324	80.8	45	11.2	28	7.0	4	1.0
Middle	111	75	67.6	21	18.9	9	8.1	6	5.4
Western	317	257	81.1	42	13.2	15	4.7	3	0.9
Mississippi									
Northern	165	105	63.6	48	29.1	12	7.3	0	0.0
Southern	352	269	76.4	68	19.3	12	3.4	3	0.9
Texas									
Eastern	583	472	81.0	63	10.8	45	7.7	3	0.5
Northern	984	750	76.2	168	17.1	58	5.9	18	1.8
Southern	4,542	3,237	71.3	554	12.2	712	15.7	39	0.9
Western	4,796	3,280	67.0	626	13.1	911	19.1	29	0.9
SIXTH CIRCUIT	**4,426**	**2,959**	**66.9**	**1,152**	**26.0**	**280**	**6.3**	**35**	**0.8**
Kentucky									
Eastern	404	288	71.3	99	24.5	15	3.7	2	0.5
Western	392	303	77.3	69	17.3	18	4.6	3	0.8
Michigan									
Eastern	727	510	71.4	161	22.1	44	6.1	3	0.4
Western	374	217	58.0	113	30.2	33	8.8	11	2.9
Ohio									
Northern	888	560	63.1	286	25.5	80	10.6	6	0.7
Southern	360	213	59.2	113	31.4	31	8.6	3	0.8
Tennessee									
Eastern	613	448	73.1	132	24.8	13	2.1	0	0.0
Middle	385	181	59.3	109	35.7	13	4.3	2	0.7
Western	443	280	63.2	131	29.6	27	6.1	5	1.1
SEVENTH CIRCUIT	**2,678**	**1,855**	**69.3**	**984**	**31.8**	**318**	**8.1**	**21**	**0.8**
Illinois									
Central	324	211	65.1	94	29.0	17	5.2	2	0.6
Northern	1,078	689	63.9	262	24.3	112	10.4	15	1.4
Southern	288	244	84.7	30	10.4	14	4.9	0	0.0
Indiana									
Northern	350	250	71.4	74	21.1	25	7.1	1	0.3
Southern	236	150	63.6	58	24.6	27	11.4	1	0.4
Wisconsin									
Eastern	278	202	72.7	56	20.1	20	7.2	0	0.0
Western	124	109	87.9	10	8.1	3	2.4	2	1.6
EIGHTH CIRCUIT	**3,565**	**2,478**	**69.5**	**674**	**18.9**	**388**	**10.7**	**41**	**1.2**
Arkansas									
Eastern	241	199	82.6	33	13.7	7	2.9	2	0.8
Western	142	108	76.1	28	19.7	6	4.2	0	0.0
Iowa									
Northern	351	233	66.4	83	23.6	28	8.0	7	2.0
Southern	282	184	65.2	56	19.9	41	14.5	1	0.4
Minnesota	363	225	62.0	68	18.7	68	18.7	2	0.6
Missouri									
Eastern	997	455	76.2	106	17.8	35	5.9	1	0.2
Western	636	399	62.7	197	31.0	38	6.0	2	0.3
Nebraska	523	351	67.1	70	13.4	100	19.1	2	0.4
North Dakota	141	101	71.6	17	12.1	17	12.1	6	4.3
South Dakota	289	219	74.4	16	5.5	40	13.8	19	6.2

Table 26 (cont.)

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE n	 %	SUBSTANTIAL ASSISTANCE DEPARTURE n	 %	OTHER DOWNWARD DEPARTURE n	 %	UPWARD DEPARTURE n	 %
NINTH CIRCUIT	**11,733**	**5,723**	**48.8**	**1,385**	**11.8**	**4,560**	**38.7**	**85**	**0.7**
Alaska	162	108	66.7	32	19.8	18	11.1	4	2.5
Arizona	3,395	1,048	30.9	241	7.1	2,074	61.1	32	0.9
California									
Central	972	734	75.5	114	11.7	120	12.3	4	0.4
Eastern	730	539	73.8	138	18.9	50	6.8	3	0.4
Northern	698	416	62.9	79	12.0	157	23.9	8	1.2
Southern	2,995	1,120	37.4	229	7.6	1,642	54.8	4	0.1
Guam	128	87	68.0	38	29.7	2	1.6	1	0.8
Hawaii	358	195	54.5	131	36.6	32	8.9	0	0.0
Idaho	178	100	56.2	51	28.7	22	12.4	5	2.8
Montana	346	250	74.0	61	17.6	20	5.8	9	2.6
Nevada	399	407	72.1	35	9.8	67	17.4	4	0.7
Northern Mariana Islands	5	2	40.0	3	60.0	0	0.0	0	0.0
Oregon	562	302	60.2	88	17.5	109	21.7	3	0.6
Washington									
Eastern	272	138	50.7	29	10.7	103	37.9	2	0.7
Western	472	277	58.6	96	20.3	94	19.9	6	1.3
TENTH CIRCUIT	**3,833**	**2,551**	**66.6**	**423**	**11.0**	**829**	**21.9**	**22**	**0.6**
Colorado	569	330	57.6	103	20.7	67	12.2	3	0.5
Kansas	493	369	74.8	76	15.4	44	8.9	4	0.8
New Mexico	1,737	1,064	61.3	85	4.9	584	33.6	4	0.2
Oklahoma									
Eastern	80	56	70.0	3	3.8	21	26.3	0	0.0
Northern	191	122	60.8	23	15.2	5	3.3	1	0.7
Western	152	102	67.1	34	22.4	11	7.2	5	3.3
Utah	542	421	77.7	25	4.6	95	17.5	1	0.2
Wyoming	129	101	78.3	12	9.3	12	9.3	4	3.1
ELEVENTH CIRCUIT	**6,223**	**4,370**	**70.2**	**1,395**	**22.4**	**414**	**6.7**	**44**	**0.7**
Alabama									
Middle	149	71	47.7	69	46.3	7	4.7	2	1.3
Northern	500	319	63.8	158	31.6	19	3.8	4	0.8
Southern	304	190	62.5	103	33.9	10	3.3	1	0.3
Florida									
Middle	1,384	983	58.0	467	33.7	103	7.4	11	0.8
Northern	321	221	68.8	82	25.5	14	4.4	4	1.2
Southern	2,211	1,795	80.7	284	12.8	124	6.1	9	0.4
Georgia									
Middle	311	230	74.0	68	21.9	10	3.2	3	1.0
Northern	771	543	70.4	124	16.1	97	12.6	7	0.9
Southern	271	208	76.8	40	14.8	20	7.4	3	1.1

[1]Of the 64,366 cases, 365 cases with no contiguous guidelines were excluded from the table. Of the remaining 64,001 cases, 5,317 were excluded due to missing departure information. Districts for which departure information is missing in five percent or more of the cases received included: Central California (44.0%), Eastern Virginia (24.3%), Southern California (22.8%), Delaware (21.2%), Southern West Virginia (20.0%), Eastern New York (19.7%), Western Washington (18.4%), Utah (18.3%), Northern Mariana Islands (16.7%), Eastern Kentucky (16.5%), Puerto Rico (15.8%), Western Oklahoma (14.1%), Northern Indiana (11.2%), Southern Florida (11.1%), Maine (11.0%), Virgin Islands (12.6%), Southern New York (12.2%), Western North Carolina (12.1%), Western Louisiana (11.9%), Idaho (11.0%), Rhode Island (10.0%), Eastern Washington (9.9%), Northern California (9.7%), Northern New York (8.9%), Middle Georgia (8.9%), Southern Ohio (8.4%), Oregon (7.9%), Guam (7.9%), Nevada (7.6%), Western Kentucky (7.1%), Eastern Texas (7.0%), Northern Ohio (7.0%), Minnesota (6.7%), Western Pennsylvania (6.2%), Central Illinois (5.8%), Southern Georgia (5.6%), Eastern Michigan (5.5%), Middle Pennsylvania (5.3%), Middle Florida (5.1%), and Middle Alabama (5.1%). Descriptions of variables used in the table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2002 Data file, USSCFY2002.

Table 27

OFFENDERS RECEIVING DEPARTURES IN EACH PRIMARY OFFENSE CATEGORY[1]
Fiscal Year 2002 (Prior to Enactment of the PROTECT Act)

		SENTENCED WITHIN RANGE		SUBSTANTIAL ASSISTANCE DEPARTURE		OTHER DOWNWARD DEPARTURE		UPWARD DEPARTURE	
PRIMARY OFFENSE	TOTAL	Number	Percent	Number	Percent	Number	Percent	Number	Percent
TOTAL	58,423	37,968	65.0	10,170	17.4	9,828	16.8	457	0.8
Murder	76	50	65.8	4	5.3	9	11.9	13	17.1
Manslaughter	57	37	64.9	1	1.8	6	10.5	13	22.8
Kidnapping/Hostage Taking	57	33	57.9	4	7.0	12	21.1	8	14.0
Sexual Abuse	195	142	72.8	2	1.0	37	19.0	14	7.2
Assault	445	347	78.0	12	2.7	70	15.7	16	3.6
Robbery	1,522	1,051	69.1	227	14.9	220	14.5	24	1.6
Arson	59	38	64.4	14	23.7	4	6.8	3	5.1
Drugs - Trafficking	23,949	13,398	55.9	6,563	27.4	3,932	16.4	54	0.2
Drugs - Communication Facility	421	303	72.0	56	13.3	61	14.5	1	0.2
Drugs - Simple Possession	481	458	95.2	17	3.5	4	0.8	2	0.4
Firearms	4,768	3,511	73.7	581	12.2	602	12.6	71	1.5
Burglary/B&E	42	30	71.4	5	11.9	4	9.5	3	7.1
Auto Theft	151	93	61.6	41	27.2	14	9.3	3	2.0
Larceny	2,838	1,745	85.6	151	7.4	126	6.2	16	0.8
Fraud	6,378	4,539	71.2	1,135	17.8	633	9.9	71	1.1
Embezzlement	672	588	87.5	24	3.6	58	8.6	2	0.3
Forgery/Counterfeiting	1,363	1,091	80.3	159	11.7	97	7.1	13	1.0
Bribery	148	87	58.8	41	27.7	20	13.5	0	0.0
Tax	557	352	63.2	107	19.2	95	17.1	3	0.5
Money Laundering	852	496	58.2	245	28.8	101	11.9	10	1.2
Racketeering/Extortion	744	474	63.7	178	23.9	75	10.1	17	2.3
Gambling/Lottery	95	57	60.0	27	28.4	11	11.6	0	0.0
Civil Rights	87	60	69.0	16	18.4	11	12.6	0	0.0
Immigration	10,399	6,861	66.0	248	2.4	3,236	31.1	54	0.5
Pornography/Prostitution	613	442	72.1	34	5.5	117	19.1	20	3.3
Prison Offenses	297	229	77.1	19	6.4	46	15.5	3	1.0
Administration of Justice Offenses	1,010	719	71.2	144	14.3	134	13.3	13	1.3
Environmental/Wildlife	121	76	62.8	25	20.7	20	16.5	0	0.0
National Defense	9	6	66.7	1	11.1	2	22.2	0	0.0
Antitrust	16	5	31.3	9	56.3	2	12.5	0	0.0
Food & Drug	77	55	71.4	10	13.0	11	14.3	1	1.3
Other Miscellaneous Offenses	727	592	81.4	68	9.4	58	8.0	9	1.2

[1] Of the 64,366 cases, 3,943 were excluded due to one or both of the following reasons: missing primary offense (393) or missing/inapplicable departure information (3,643). Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2002 Datafile, USSCFY02.

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